

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

ROGER M. ROCHA,

Petitioner,

V.

J. JANDA, Warden,

### Respondent.

Case No. EDCV 12-1243-GW (LAL)

# FINAL REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Final Report and Recommendation is submitted to the Honorable George H. Wu, United States District Judge, under the provisions of 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California.

L.

## PROCEEDINGS

On July 26, 2012, Roger M. Rocha (“Petitioner”) filed a Petition for Writ of Habeas Corpus by a Person in State Custody pursuant to 28 U.S.C. § 2254 (“Petition”). On November 16, 2012, Respondent filed an Answer to the Petition. On November 30, 2012, Petitioner filed a Reply. Thus, this matter is ready for decision.

II.

## **PROCEDURAL HISTORY**

On March 2, 2011, Petitioner pleaded guilty in Riverside County Superior Court to one count of gross vehicular manslaughter while intoxicated,<sup>1</sup> and admitted two allegations that he personally inflicted bodily injury on a person during the commission of the gross vehicular manslaughter.<sup>2</sup> The same day, the trial court sentenced Petitioner to the agreed upon term of 16 years in state prison. (Lodgment 1 at 1-2; Lodgment 8 at 4-7.)

On February 17, 2012, Petitioner filed a habeas corpus petition in the Riverside County Superior Court. (Lodgment 2.) On February 24, 2012, the superior court denied the petition on procedural grounds. (Lodgment 3.)

On March 13, 2012, Petitioner filed a habeas corpus petition in the California Court of Appeal. (Lodgment 4.) On March 16, 2012, the California Court of Appeal summarily denied habeas relief. (Lodgment 5.)

On April 6, 2012, Petitioner filed a habeas corpus petition in the California Supreme Court. (Lodgment 6.) On July 11, 2012, the California Supreme Court summarily denied habeas relief. (Lodgment 7.)

III.

## **FACTUAL BACKGROUND**

The record before this Court does not detail the facts underlying Petitioner's convictions. The Information suggests that Petitioner caused a car accident while driving under the influence of alcohol or drugs. Petitioner killed Carlos Delgado and injured Alejandro Gill Ayala and Alejandro Ayala Hernandez. (Lodgment 8 at 1-3.)

On March 15, 2010, the prosecution charged Petitioner with one count of first degree murder (Count One), one count of gross vehicular manslaughter (Count Two), and one count of driving while intoxicated resulting in death (Count Three). As to Counts Two and Three, the prosecution further alleged that Petitioner caused injury to Ayala and Hernandez during the

<sup>1</sup> Cal. Penal Code § 191.5(a).

<sup>2</sup> Cal. Penal Code § 12022.7.

1 commission of the crimes. (Lodgment 8 at 1-3.) On March 2, 2011, Petitioner agreed to plead  
2 guilty to Count Two and admit the accompanying allegations of great bodily injury, in exchange  
3 for the maximum sentence of 16 years for the conviction and allegations. (Lodgment 8 at 4-5.)

4 **IV.**

5 **PETITIONER'S CLAIM**

6 Petitioner raises three claims for relief:

7 (1) The trial court erred by imposing multiple punishments for the same act (Petition  
8 at 5);  
9 (2) The trial court erred by imposing an upper term sentence based on the court's  
10 improper dual use of facts (Petition at 5-6); and  
11 (3) The state appellate courts erred by denying Petitioner the opportunity to file an  
12 untimely appeal (Petition at 6).<sup>3</sup>

13 **V.**

14 **STANDARD OF REVIEW**

15 **A. 28 U.S.C. § 2254.**

16 The standard of review that applies to Petitioner's claims is stated in 28 U.S.C. § 2254, as  
17 amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"):

18 (d) An application for a writ of habeas corpus on behalf of a person in custody  
19 pursuant to the judgment of a State court shall not be granted with respect to any  
claim that was adjudicated on the merits in State court proceedings unless the  
adjudication of the claim--  
20 (1) resulted in a decision that was contrary to, or involved an  
unreasonable application of, clearly established Federal  
law, as determined by the Supreme Court of the United  
States; or  
21 (2) resulted in a decision that was based on an unreasonable  
determination of the facts in light of the evidence presented in  
the State court proceeding.

22 28 U.S.C. § 2254(d). If these standards are difficult to meet, it is because they were meant to be.

23 As the Supreme Court stated in Harrington v. Richter,<sup>4</sup> while the AEDPA "stops short of

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28 <sup>3</sup> Respondent argues that Claims One and Two are defaulted by the Riverside County Superior Court's denial of  
relief with a citation to In re Clark, 5 Cal.4th 750, 765 (1993). (Answer at 9-11.) In the interest of judicial  
economy, this Court will address Petitioner's claims on the merits rather than perform the procedural default  
analysis.

<sup>4</sup> 131 S. Ct. 770, 786, 178 L. Ed. 2d 624 (2011).

1 imposing a complete bar on federal court relitigation of claims already rejected in state  
 2 proceedings[,]” habeas relief may be granted only “where there is no possibility fairminded  
 3 jurists could disagree that the state court’s decision conflicts” with United States Supreme Court  
 4 precedent. Further, a state court factual determination must be presumed correct unless rebutted  
 5 by clear and convincing evidence.<sup>5</sup>

6 **B. Sources of “Clearly Established Federal Law.”**

7 According to Williams v. Taylor,<sup>6</sup> the law that controls federal habeas review of state  
 8 court decisions under the AEDPA consists of holdings (as opposed to dicta) of Supreme Court  
 9 decisions “as of the time of the relevant state-court decision.” To determine what, if any,  
 10 “clearly established” United States Supreme Court law exists, a federal habeas court also may  
 11 examine decisions other than those of the United States Supreme Court.<sup>7</sup> Ninth Circuit cases  
 12 “may be persuasive.”<sup>8</sup> A state court’s decision cannot be contrary to, or an unreasonable  
 13 application of, clearly established federal law, if no Supreme Court decision has provided a clear  
 14 holding relating to the legal issue the habeas petitioner raised in state court.<sup>9</sup>

15 Although a particular state court decision may be both “contrary to” and an  
 16 “unreasonable application of” controlling Supreme Court law, the two phrases have distinct  
 17 meanings under Williams.

18 A state court decision is “contrary to” clearly established federal law if the decision either  
 19 applies a rule that contradicts the governing Supreme Court law, or reaches a result that differs  
 20 from the result the Supreme Court reached on “materially indistinguishable” facts.<sup>10</sup> If a state  
 21 court decision denying a claim is “contrary to” controlling Supreme Court precedent, the  
 22 reviewing federal habeas court is “unconstrained by § 2254(d)(1).”<sup>11</sup> However, the state court

23 <sup>5</sup> 28 U.S.C. § 2254(e)(1).

24 <sup>6</sup> 529 U.S. 362, 412, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000).

25 <sup>7</sup> LaJoie v. Thompson, 217 F.3d 663, 669 n.6 (9th Cir. 2000).

26 <sup>8</sup> Duhaime v. Ducharme, 200 F.3d 597, 600 (9th Cir. 1999).

27 <sup>9</sup> Brewer v. Hall, 378 F.3d 952, 955 (9th Cir. 2004); see also Carey v. Musladin, 549 U.S. 70, 77, 127, S. Ct. 649, 649, 166 L. Ed. 2d 482 (2006) (in the absence of a Supreme Court holding regarding the prejudicial effect of spectators’ courtroom conduct, the state court’s decision could not have been contrary to or an unreasonable application of clearly established federal law).

28 <sup>10</sup> Early v. Packer, 537 U.S. 3, 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002) (per curiam) (citing Williams, 529 U.S. at 405-06).

29 <sup>11</sup> Williams, 529 U.S. at 406.

1 need not cite or even be aware of the controlling Supreme Court cases, “so long as neither the  
2 reasoning nor the result of the state-court decision contradicts them.”<sup>12</sup>

3 State court decisions that are not “contrary to” Supreme Court law may be set aside on  
4 federal habeas review only “if they are not merely erroneous, but ‘an unreasonable application’  
5 of clearly established federal law, or based on ‘an unreasonable determination of the facts.’”<sup>13</sup>  
6 Accordingly, this Court may reject a state court decision that correctly identified the applicable  
7 federal rule but unreasonably applied the rule to the facts of a particular case.<sup>14</sup> However, to  
8 obtain federal habeas relief for such an “unreasonable application,” a petitioner must show that  
9 the state court’s application of Supreme Court law was “objectively unreasonable” under  
10 Woodford v. Visciotti.<sup>15</sup> An “unreasonable application” is different from merely an incorrect  
11 one.<sup>16</sup>

12 Where, as here, the state courts have supplied no reasoned decision for denying the  
13 petitioner’s claims on the merits,<sup>17</sup> this Court must perform an “‘independent review of the  
14 record’ to ascertain whether the state court decision was objectively unreasonable.”<sup>18</sup>

## 15 VI.

### 16 DISCUSSION

#### 17 A. Multiple Punishments.

18 In Ground One, Petitioner argues that, because his conviction for gross vehicular  
19 manslaughter and the accompanying allegations of great bodily injury resulted from a single act,  
20 i.e. the car accident, the trial court erred by imposing multiple sentences for the conviction and  
21 allegations. (Petition at 5.)<sup>19</sup>

22 <sup>12</sup> Early, 537 U.S. at 8.

23 <sup>13</sup> Id. at 11 (citing 28 U.S.C. § 2254(d)).

24 <sup>14</sup> See Williams, 529 U.S. at 406-10, 413.

25 <sup>15</sup> 537 U.S. 19, 27, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002).

26 <sup>16</sup> Williams, 529 U.S. at 409-10.

27 <sup>17</sup> Petitioner presented Claim One to the Los Angeles County Superior Court on habeas corpus review. (Lodgment 6 at 1-7.) However, the superior court discussed only Petitioner’s ineffective assistance of appellate counsel claim in its decision denying habeas relief. (Lodgment 7.)

28 <sup>18</sup> Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003) (citing Delgado v. Lewis, 223 F.3d 976, 981-82 (9th Cir. 2000)).

<sup>19</sup> Petitioner cites the Eighth Amendment in support of his argument, thereby suggesting he intended to present a cruel and unusual punishment claim. (Petition at 5.) However, Petitioner’s discussion of his claim indicates he intended to present a double jeopardy claim. This Court addresses Petitioner’s apparent double jeopardy claim

1       First, the State is entitled to enforce the terms of Petitioner's plea agreement.<sup>20</sup>

2 Accordingly, Petitioner cannot now challenge the sentence he agreed to during plea negotiations.

3       Second, to the extent Petitioner may be permitted to challenge his sentence, he fails to  
4 show that the sentence violates double jeopardy. The Double Jeopardy Clause contains three  
5 distinct constitutional protections.<sup>21</sup> "It protects against a second prosecution for the same  
6 offense after acquittal. It protects against a second prosecution for the same offense after  
7 conviction. And it protects against multiple punishments for the same offense."<sup>22</sup> In the  
8 multiple punishment context, the interest the Double Jeopardy Clause protects "is limited to  
9 ensuring that the total punishment did not exceed that authorized by the legislature."<sup>23</sup> "Where .  
10 . . a legislature specifically authorizes cumulative punishment under two statutes, regardless of  
11 whether those two statutes proscribe the 'same' conduct . . . , a court's task of statutory  
12 construction is at an end and the prosecutor may seek and the trial court or jury may impose  
13 cumulative punishments under such statutes in a single trial."<sup>24</sup>

14       Here, Petitioner pleaded guilty to gross vehicular manslaughter under California Penal  
15 Code section 191.5(a), which carries a prison term of four, six, or 10 years.<sup>25</sup> (Lodgment 1 at 1at  
16 1; Lodgment 8 at 5.) In addition, Petitioner admitted allegations under California Penal Code  
17 section 12022.7(a) that he caused great bodily injury to two other victims while committing  
18 gross vehicular manslaughter. (Lodgment 1 at 2; Lodgment 8 at 5.) Each allegation under  
19 section 12022.7(a) required an additional three years sentence.<sup>26</sup> Thus, state law contemplated a  
20 sentence of up to 16 years for a conviction of gross vehicular manslaughter with two allegations

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22 below. To the extent Petitioner intended to present a cruel and unusual punishment claim under the Eighth  
23 Amendment, this Court has considered and rejected his claim.

24       <sup>20</sup> Santobello v. New York, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971) ("[W]hen a plea rests in any  
25 significant degree on a promise or agreement[,] . . . such promise must be fulfilled."); see also People v.  
Cunningham, 49 Cal.App.4th 1044, 1048 (1996) ("The People, as well as defendant, are entitled to enforce the  
26 terms of a plea bargain").

27       <sup>21</sup> Plascencia v. Alameida, 467 F.3d 1190, 1204 (9th Cir. 2006).

28       <sup>22</sup> Ohio v. Johnson, 467 U.S. 493, 498, 104 S. Ct. 2536, 81 L. Ed. 2d 425 (1984) (citation and internal quotation  
marks omitted).

29       <sup>23</sup> Jones v. Thomas, 491 U.S. 376, 381, 109 S. Ct. 2522, 105 L. Ed. 2d 322 (1989) (citation and internal quotation  
marks omitted).

30       <sup>24</sup> Missouri v. Hunter, 459 U.S. 359, 368-69, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983).

31       <sup>25</sup> Cal. Penal Code § 191.5(c)(1).

32       <sup>26</sup> Cal. Penal Code § 12022.7(a).

1 of great bodily injury. Such a legislatively endorsed sentence cannot violate double jeopardy.

2 Accordingly, this Court finds that the California courts' denial of Petitioner's double  
3 jeopardy claim was neither contrary to, nor involved an unreasonable application of, clearly  
4 established federal law, as determined by the United States Supreme Court. Claim One does not  
5 support habeas relief.

6 **B. Dual Use.**

7 In Claim Two, Petitioner argues that the trial court erred by imposing an aggravated  
8 prison term on the gross vehicular manslaughter charge based on the court's dual use of facts.  
9 (Petition at 5-6.) Specifically, Petitioner states that “[t]he trial court imposed an aggravated term  
10 based on a prior conviction (misdemeanor) which may not be used as an element of a present  
11 offense to enhance the sentence for that offense.” (Petition at 5-6.) Petitioner appears to argue,  
12 pursuant to People v. Edwards,<sup>27</sup> that the trial court improperly used his prior conviction to  
13 increase his sentence despite the fact that the prior conviction constituted an element of the  
14 current offense. (See Lodgment 2 at 4; Lodgment 4 at 4; Lodgment 6 at 4.) In addition,  
15 Petitioner appears to argue, pursuant to People v. McFearson,<sup>28</sup> that the trial court improperly  
16 imposed an upper term sentence based on an enhancement pursuant to which an additional  
17 sentence was also imposed. (See Lodgment 2 at 4; Lodgment 4 at 4; Lodgment 6 at 4.)  
18 Petitioner's argument fails in both respects.

19 First, the California Supreme Court held in Edwards that “[a] court's reliance on [a]  
20 defendant's prior conviction for the dual purpose of augmenting sentence and providing an  
21 essential element of the charged offense [] runs afoul of the established rule that when a prior  
22 conviction constitutes an element of criminal conduct which otherwise would be noncriminal,  
23 the minimum sentence may not be increased because of the indispensable prior conviction.”<sup>29</sup>  
24 However, this is not what happened in Petitioner's case. Assuming, although it is not apparent  
25 from the record, that the trial court imposed an upper term sentence for gross vehicular  
26 manslaughter based on a finding that Petitioner's criminal history warranted an aggravated

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27 18 Cal.3d 796 (1976).

28 168 Cal.App.4th 388, 392 (2008).

29 Edwards, 18 Cal.3d at 800.

1 sentence, Petitioner's claim fails. Petitioner's conviction of gross vehicular manslaughter did not  
 2 include as an essential element of the offense the fact of a prior conviction. Thus, even if the  
 3 trial court used Petitioner's prior misdemeanor conviction to impose an upper term sentence, it  
 4 did not also use the prior misdemeanor conviction to sustain Petitioner's conviction for the  
 5 charged offense of gross vehicular manslaughter. Accordingly, Petitioner's sentence did not  
 6 violate the principles of Edwards.

7 In McFearson, the California Court of Appeal discussed California Penal Code section  
 8 1170(b), which states, “[t]he court may not impose an upper term by using the fact of any  
 9 enhancement upon which sentence is imposed under any provision of law.”<sup>30</sup> Again assuming  
 10 Petitioner's claim that the trial court imposed an upper term sentence for gross vehicular  
 11 manslaughter based on Petitioner's prior misdemeanor conviction, the court did not violate the  
 12 principles at issue in McFearson. The enhancements imposed upon Petitioner were for causing  
 13 great bodily injury under California Penal Code section 12022.7(a), (Lodgment 8 at 5), not  
 14 because of any convictions Petitioner suffered in the past. Accordingly, the trial court could not  
 15 have imposed an upper term sentence for gross vehicular manslaughter and imposed sentencing  
 16 enhancements based on the same fact of a prior conviction.

17 Accordingly, this Court finds that the California courts' denial of Petitioner's dual  
 18 purpose claim was neither contrary to, nor involved an unreasonable application of, clearly  
 19 established federal law, as determined by the United States Supreme Court. Claim Two does not  
 20 support habeas relief.

21 **C. State Appeal.**

22 Finally, in Claim Three, Petitioner argues that the state appellate courts violated state law  
 23 and rules of court by refusing to allow Petitioner an opportunity to explain why he wanted to file  
 24 a late appeal. (Petition at 6.) Petitioner states that he was unable to file a timely appeal in the  
 25 state courts because he “did not have access to legal materials at that time due to ‘orientation’  
 26 status at reception [center].” (Petition at 3.)

27 Petitioner alleges only a violation of state law. Such a claim is not reviewable on federal  
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<sup>30</sup> McFearson, 168 Cal.App.4th at 392.

1 habeas corpus.<sup>31</sup> To the extent Petitioner could show a federal constitutional claim, his claim  
2 fails on the facts. Petitioner has not presented any evidence that he attempted to file an untimely  
3 appeal. Thus, he cannot show that the state courts denied such an appeal.

4 Accordingly, this Court finds that the California courts' denial of Petitioner's right to  
5 appeal claim was neither contrary to, nor involved an unreasonable application of, clearly  
6 established federal law, as determined by the United States Supreme Court. Claim Three does  
7 not support habeas relief.

8 **VII.**

9 **RECOMMENDATION**

10 IT THEREFORE IS RECOMMENDED that the District Court issue an Order: (1)  
11 approving and accepting this Final Report and Recommendation; and (2) directing that Judgment  
12 be entered denying the Petition and dismissing this action with prejudice.

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15 DATED: November 17, 2015

16   
17 HONORABLE LOUISE A. LAMOTHE  
United States Magistrate Judge

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31 Estelle v. McGuire, 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991).